United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 75-7518 75-7679

To be argued by
C. MACNEIL MITCHELL

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

TELEDYNE INDUSTRIES, INC.,

Plaintiff-Appellee,

against

OLIF PODELL, SIMON SEVENIK, NICHOLAS ANTON, SAUL WALLER,

P/S

Defendants-Appellants,

and

[illegible] CORPORATION and KERNS MANUFACTURING CORP.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF PLAINTIFF-APPELLEE

(Appeal from Order Denying Motion for a New Trial)

BREED, ABBOTT & MORGAN
Attorneys for Plaintiff-Appellee
One Chase Manhattan Plaza
New York, New York 10005

[illegible] R. LANG
C. MACNEIL MITCHELL
[illegible] F. VARY
Of Counsel

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United States Court of Appeals

FOR THE SECOND CIRCUIT

TELEDYNE INDUSTRIES, INC.,

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Preliminary Statement

This is an appeal from so much of an order of the United States District Court for the Southern District of New York (Knapp, J.), filed November 3, 1975 (A51),* as denied defendants-appellants' ("appellants") motion for a new trial on the grounds of newly discovered evidence.

Statement of the Issue Presented for Review

1. Did Judge Knapp abuse his discretion in denying appellants' untimely motion for a new trial on the alterna-

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* References prefixed "A" are to the joint appendix on appeal and "Tr" are to the trial transcript in the District Court.

tive grounds that (a) the purported new evidence could with due diligence have been discovered and presented by motion served not later than 10 days after entry of judgment, and, in addition, that (b) such evidence was in any event cumulative, irrelevant and inconsequential?

Statement of the Case

Detailed statements of the factual background of this action are contained in Judge Knapp's memorandum decision granting judgment after trial (401 F.Supp. 729 (S.D.N.Y. 1975)), in the brief of plaintiff-appellee Teledyne Industries, Inc. ("Teledyne")* submitted on the companion appeal herein (Docket No. 75-7518) and in Teledyne's Memorandum of Law in Opposition to Defendants' Motion for a New Trial ("Teledyne Memo").** Since these two appeals have been consolidated for purposes of oral argument, Teledyne will assume that this Court is already familiar with the entire factual background from the companion appeal.

The theme of appellants' post-trial motion seems to be that Teledyne, through its representatives, Harold W. Rouse ("Rouse") and Homer F. Coleman ("Coleman"), conspired with two other persons to defraud Eon Corporation ("Eon"). Appellants' principal averments to this effect are that Rouse and Coleman bribed Eon's representative, M. James Leonard ("Leonard"), to establish the Special Account and to keep the fact of its existence a secret from the rest of Eon's board, *i.e.*, appellants. Crucial to such an argument is the further assumption that Eon's directors would *not* have let Eon enter into the Special Account arrangement had they known about it at the time the Subcontract was let, and therefore that

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* Abbreviations and definitions used herein are identical to those used in Teledyne's brief on the companion appeal.

** Part of the record on this appeal.

Teledyne knowingly "bought" Eon's unwitting commitment thereto by way of a bribe to its employee, Leonard (A15-16, 19). Even a cursory review of the trial record in this case shows appellants' contentions in this regard to be frivolous.

a. Walper's "inkling" as to Rouse's and Coleman's state of mind.

In his first *ex parte* post-trial statement* given to appellants' attorneys, Walper asserted that

> "The first date, from the onset, Rouse had *an inkling* that Jim and I were sharing in the proceeds of the $5. per unit of each generator. When Coleman and Leonard got into a heated discussion in negotiations and left the room, Rouse went into the other room with Jim and when they returned, the deal was pretty well made. *Leonard, Rouse and Coleman all knew everything necessary and knew it was a good deal and Jim was getting his share and I was getting mine.* Eventually, Jim received approximately $4700. *from me* from part of my share." (A21)**

Teledyne submitted in opposition to this motion affidavits from Rouse and Coleman which detailed the myriad factual inaccuracies, and significant *omissions,* of Walper Affidavit #1 (A34, 38). Moreover, Rouse and Coleman categorically denied that they ever had any suspicion or information—prior to reading Walper Affidavit #1—concerning Leonard's supposed participation in Walper's

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* Appellants' alleged "new evidence" consists of the Affidavit of appellant Saul Waller, sworn to October 20, 1975 ("Waller Affidavit") and the Affidavits of Gene Walper, sworn to May 9, 1975 ("Walper Affidavit #1") and November 17, 1975 ("Walper Affidavit #2") (A21, 30-31, 60-64).

** Unless otherwise indicated, all emphasis in quotations does not appear in the original, but has been added.

fee. It is important to note that *Walper did not claim to have heard any statements made to Rouse or Coleman from which they could reasonably have inferred* the existence of a commission-sharing agreement. There were thus no objective facts offered by Walper to support his "inkling."

Walper's statement that Rouse and Coleman

> "knew everything necessary and knew it was a good deal and Jim was getting his share and I was getting mine" (A21)

was a study in intentional ambiguity. Again, no claim of any particular statement having been made to Rouse or Coleman is presented. What the "good deal" was and what Leonard's "share" of the "good deal" refers to are not explained. Since appellants' entire argument must therefore be based entirely on "fair inferences" from Walper Affidavit #1** (A11), it is at least an equally fair inference (as Judge Knapp so found) that Walper was referring to the $10,000 bonus Leonard would receive *from Eon* for subcontracting the 1.5 kilowatt generator set contract and closing down the American Marc facility.

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* Judge Knapp interpreted this language as follows:
"Walper's affidavit further states that plaintiff's agent knew 'Jim [Leonard] was getting his share'. In view of the preceding 'inkling' language, I take this latter reference to 'his share' to relate to the special bonus Leonard was receiving *from Eon*. In this connection, it is interesting to note that Walper's affidavit was apparently not in his own words, but was 'dictated and prepared' in his 'presence'. Presumably, therefore, whoever 'dictated and prepared' it went as far as possible to make the language favorable to defendants' position." (A57)

** Which presumably was drawn by or at the request of none other than appellants' counsel himself (*see* preceding fn.). Why an attorney should have to rely on "fair inferences" from an affidavit prepared by himself or by someone else who "went as far as possible to make the language favorable to [appellants'] position" is not explained.

Walper Affidavit # 2 (A60), purportedly submitted to "clarify the meaning" of his earlier "inkling" in light of criticism contained in Teledyne's opposing papers, and while no doubt straining his recollection to the utmost, again pointedly refuses to state any *facts* demonstrating Rouse's state of knowledge. Instead, the only "evidence" proffered is that a meeting between Rouse and Leonard occurred *outside Walper's presence* (A62), that a commission check *made payable to Walper was sent to Walper,* in care of Leonard, at the American Marc offices* (A63), and that Walper got paid his entire commission even though Eon never fully paid Teledyne under the Subcontract (A63). Judge Knapp found these points unpersuasive and denied reargument.**

b. Waller's unconfirmed and undocumented "belief" that Teledyne may have paid an undetermined amount to a company in which Leonard was possibly interested, and that such payment could conceivably have been made for other than normal business purposes.

Just as Walper's proposed "new evidence" consisted of an "inkling" unsupported by objective facts and couched in purposefully ambiguous language (presumably drafted

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* This is readily explainable. Apparently Leonard called Rouse in July, 1971 and told him that Walper wanted his commission check mailed to the American Marc offices (A63), which also happened to house the offices of S&S Machinery Corporation ("S&S"), a company controlled by appellant Simon Srybnik (Tr 1451). Since Walper was apparently under retainer to and had an office at S&S at the time (Tr 1149-50), and Leonard was also then a part-time S&S employee (Tr 1104, 1175), such a request would not have been suspicious, especially since the check was made payable solely to Walper.

Walper's first point self-destructs by his admission that he was not present. His third point fails to lead to any logical inference whatsoever and is the wildest speculation.

** "Neither the 'Additional Affidavit' [of appellants' counsel

(footnote continued on following page)

by appellants' counsel), the Waller Affidavit's "new evidence" consisted of Waller's unsupported "belief" that *prior to the close of evidence or to the entry of judgment herein* he

> "saw records of payments made by Teledyne, subsesequent to May 12, 1971, to Technicon Associates. At the time Technicon Associates *meant nothing to me* and *I made no records of my observations.*
>
> "Very recently, in reviewing documents relating to defendants' appeal, I found evidence indicating that Technicon Associates is a company controlled by M.J. Leonard . . ." (A30-31)

Waller's "belief", while perhaps a word chosen as intended to denote a personal opinion stronger than Walper's "inkling", is similarly unsupported by any objective facts. Nowhere did Waller state what documents he "believes" recorded such payments; nowhere did he describe what "evidence" in appellants' possession "indicated" that Technicon Associates is a company controlled by Leonard; and nowhere did he identify the source of his information for his subsequent statement that the alleged payments to Technicon Associates had been deposited in the Palos Verdes Branch of the Bank of America.

Since Technicon Associates "meant nothing" to Waller "at the time" and since he "made no record of" his observations, it is amazing that he later remembered this item, admittedly insignificant at the time he saw it, as one out of thousands of accounting documents seen by him during his

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(footnote continued from preceding page)

(A46)] nor the instant motion [for reargument] suggests any valid reason why the material tendered was not presented to the court (a) before the trial itself or (b) in time to have been considered upon the original [post-trial] motion." (A65-66)

three-day inspection of Teledyne's detailed financial records in March 1975.*

Teledyne submitted the Affidavit of Thomas M. Jubb, controller of Teledyne's Walterboro (South Carolina) facility, who re-examined *all* the documents inspected by Waller in Walterboro, which are the only documents on which Waller's "belief" could have been based. Opposed to Waller's "belief," Mr. Jubb's affidavit (A44-45) categorically states that nowhere in such records is there any mention of either "Technicon Associates" or "Technicon."

c. The more glaring misstatements in appellants' brief.

Consistent with their practice on the companion appeal, appellants' present brief is so strewn with misstatements as to raise doubt that the parties possess a common version of the trial record. While many are on points so remote in relevance that correction is unnecessary, others cannot go unchallenged.

1. Walper's commission.

Appellants state as a purported fact that Rouse, Coleman and Leonard *admitted,* and Judge Knapp *found,* "that plaintiff had paid Eugene Wolper [sic] a commission of $5.00 per generator set *in violation of federal law and the contract between Eon and the Army.*

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* His recollection is even more incredible considering that his purpose in going to Walterboro was not to look for this sort of evidence but was only to examine the "back-up material" that went into Plaintiff's Trial Exhibits 48A, 54, 55 and 56 (Tr1839-43), which dealt solely with Teledyne's financial statement loss on the Subcontract. If, as Waller now claims, he conceived the purpose of his trip as being to find evidence of payments to Walper and Leonard, he was acting contrary to the express instructions of the Court (A30).

(A-61)" (Br., 5-6)* Not only did Teledyne and its witnesses continuously assert at trial their belief that Walper's "finder's fee" was completely legal and in violation of neither the Army Contract nor the Subcontract, but Judge Knapp in fact expressly so found:

> "The defendants argue that Teledyne's payment to Wolper [sic] was in violation of the purchase order as well as United States Government rules and regulations, and therefore the action should be dismissed. *We regard this argument as totally specious and insufficient in law.* In any case, Leonard's participation in this arrangement, acting with actual and apparent authority from Eon, would foreclose this argument to the four defendants." (401 F.Supp. at 740, n.11)

Judge Knapp again adhered to this finding in deciding the motion now on appeal:

> "Mr. MacDonnell's affidavit characterizes Walper's 'Finder's' fee as 'illegal' (p. 4). As to that, I adhere to the ruling made at trial that there was nothing illegal in paying Walper a Finder's fee . . ." (A57)

2. Teledyne's offer of a "bribe" to Leonard.

Appellants assert that Defendants' Trial Exhibit "D", a letter from Rouse to Leonard on September 10, 1971 (A28), constituted a "bribe" offer (Br., 8-11).

Exhibit "D" was introduced by appellants at trial, and therefore cannot be considered "new evidence." But leaving this aside for the moment,** the letter is addressed as follows:

> "American Marc Division
> EON Corporation

** *See* Point I, *infra.*

* Appellants' brief will be referred to as "Br.".

8831 So. Aviation Blvd.
Inglewood, California 90301

Attention: Mr. M.J. Leonard"

The letter appears to set forth a Teledyne quotation or bid for an additional 3,744 1.5 kilowatt generator sets, presumably on a subcontract basis, apparently conditioned upon American Marc Division being low bidder on a prime contract.* Reference is made to the terms and conditions for a firm order, which were to have been similar to those in the Sub ntract.

It further appears that *Eon* (and not Leonard) was to have received a net differential of $3.50 per unit, since the price quoted to Eon by Teledyne, as subcontractor, was by that amount under the price which Eon, as prime contractor, was to bid to the U.S. Government. As it turned out, either the Government never let the contract or Eon's prime bid was not accepted, and Teledyne's subcontract bid thereby became moot. How this constitutes a commercial bribe to Leonard affecting the Subcontract appellants nowhere explain.

3. The secret "bribe" to Leonard was necessary because of Eon's expressed unwillingness to give Teledyne a "trust account."

Undaunted, appellants next assert that "[i]t is apparent from the trial evidence that Eon's Board of Directors

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* At trial, appellants chose merely to introduce this document rather than to question Rouse, who was then on the witness stand under cross-examination by appellants' counsel, as to its meaning (Tr293-96). Consequently, the record contains no explanation of the circumstances surrounding the bid. Kotts, when shown the letter, stated that in his reading it did not appear in the slightest to constitute an offer of payment to Leonard (Tr529). The letter by its terms refers to IFB #DSA-400-72-B-0311, which is *not* the designation of the Army Contract, but is only an "invitation for bid" (a request for quotations) on some future contract and does *not* refer to a contract—such as the Army Contract —already awarded. Consequently, appellants' conclusion that Exhibit "D" represents a "kickback" on the "second year's procurement" (Br., 9) is totally unfounded.

would not have been agreeable to establishing a 'trust account' or assigning the proceeds of Eon's government contract to Teledyne. (A48-49)'"* (Br., 7). No trial testimony or affidavit of any of the appellants (who comprised the majority of Eon's board at the time in question) is advanced in support of this statement. In fact, appellant Anton ("Anton"), Eon's President and a member of its board, testified at trial under examination by appellants' counsel *directly to the contrary:*

> "Q We have done a lot of speculation in our time in this case and I would like to ask a question, if I may, Mr. Anton: Had you been participating in the negotiations and Teledyne would have asked you to set up in a trust fund or assign the proceeds to come from the government, as you have pointed out, as the normal procedure as provided for in the contract, would you have done that?
>
> A *Of course. Why not?*
>
> Q Knowing then what you knew and not what you know now?
>
> A Of course. As a matter of fact, we transferred the whole contract to them and they read it and the clause was in there. *All they had to do was to ask me* for the signature on that." (Tr 2185-86) (Teledyne Memo, 16-17).**

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* Appellants' citation, which does not even remotely support this proposition, is to two pages of *their counsel's own affidavit.* What does appear there, however, is an insight into appellants' attitude with regard to making statements of purported fact in their brief: "It is urged that the court should give little, if any, credence to the record." (A48).

** Were it not for appellants' counsel's demonstrated disregard for the record, it would otherwise be inexplicable how this testimony, previously called to appellants' direct attention in the Teledyne Memo, could have been ignored on this appeal.

POINT I

The standard in reviewing the denial of a motion for a new trial on the basis of newly discovered evidence is whether the District Court abused its discretion.

The rule is inflexible that a motion under Rules 59(a) and 60(b)(2), *Fed.R.Civ.P.*, for a new trial on the grounds of newly discovered evidence is one that is addressed to the sound discretion of the district court and may only be reversed for an abuse of that discretion. *Westerly Electronics Corp.* v. *Walter Kidde & Co.*, 367 F.2d 269, 270 (2d Cir. 1966); *Alison* v. *U.S.*, 251 F.2d 74, 77 (2d Cir. 1958); 7 J. Moore, *Federal Practice* ¶ 60.27[1], at 351-52 (2d ed. 1974) ("Moore").

Appellants have nowhere shown that Judge Knapp abused his discretion, and thus this appeal is frivolous.

POINT II

Although not mentioned in appellants' brief, the District Court properly found that their motion for a new trial was not timely because the "new evidence" could have been discovered with due diligence within ten days of the entry of judgment.

A. The Ten-Day Limitation Provision Of Rule 59(b), *Fed.R.Civ.P.*, Applied To This Motion.

While appellants' Notice of Motion for a new trial, dated October 20, 1975 (A6-7), states that the motion was brought under Rule 60(b)(2), it is clear that the motion was merely an untimely-filed Rule 59(b) motion. Rule 60(b)(2) expressly states that the Court may order a new trial "for the following reasons":

> "(2) newly discovered evidence which *by due diligence* could not have been discovered in time to move for a new trial under Rule 59(b). . . ."

Rule 59(b) in turn specifically provides that

> "A motion for a new trial shall be served no later than 10 days after the entry of the judgment."

Judgment in this case was entered on August 8, 1975, or two and one-half months prior to appellants' motion.

Thus, it is clear that appellants' motion under Rule 60 (b)(2) could not have been granted if, by due diligence, the "new" evidence could have been discovered prior to August 18, 1975—in other words, within the 10-day post-judgment period during which a Rule 59 motion could have been made. 7 Moore ¶ 60.23[3]. *See, e.g., Plisco* v. *Union R.R. Co.*, 379 F.2d 15, 16 (3d Cir. 1967); *Torockio* v. *Chamberlain Mfg. Co.*, 56 F.R.D. 82, 86 n.8 (W.D.Pa. 1972), *aff'd*, 474 F.2d 1340 (3d Cir. 1973); *Stiers* v. *Martin*, 277 F.2d 737 (4th Cir. 1960).

B. Appellants Did Not Act With Due Diligence And Their Motion Was Properly Denied On That Ground Alone.

Walper Affidavit #1 was sworn to a full three months *before* the entry of judgment herein,* and was thus clearly timely known to appellants and their counsel.**

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* And, therefore, well within the time in which a Rule 59(b) motion could have been brought based thereon.

** The fact that present counsel for appellants were substituted as attorneys in mid-September (A14) obviously has no bearing on what should have been presented to the District Court by mid-August. Appellants' trial counsel, who was actively involved in the post-trial period and who submitted (other) timely post-judgment motions, submitted an affidavit dated October 20 actually admitting that he had obtained Walper Affidavit #1 back in May (A32-33). Apparently he was as unimpressed with its contents initially as was Judge Knapp at a later date.

Additionally, the Waller Affidavit is based on his "belief" that he unearthed certain information on a visit to Teledyne's Walter-

(footnote continued on following page)

As part of their "recantation" argument, appellants' attorneys stated to the District Court under oath, but without citation to the record (A12-14), that Rouse and Coleman testified that Leonard never received any part of Walper's commission. In fact, *no such question* was ever put to either Rouse or Coleman at their depositions or at trial, and naturally no such testimony appears anywhere in the record.

However, appellants did admit that this issue was raised —but not pursued by their counsel to a conclusion—at *Walper's* pre-trial deposition on January 18, 1973. While appellants quoted to the District Court Walper's refusal to answer questions on that score put to him by Teledyne's counsel (A13), appellants completely overlooked or ignored that portion of the transcript showing that *appellants'* attorneys questioned—but failed to press—Walper on this very issue during their cross-examination:

> "Q I have one other question. With regard to your refusal to answer Mr. Lang's question as to sales commissions, is your refusal to answer any implication that Mr. Leonard received any of that money? Did you mean to imply that by your refusal to answer?
>
> A I don't think it is any of your business.
>
> MR. LANG: I object to the form of the question.
>
> THE WITNESS: I didn't come up here to show you my books, did I? I came up here on my own volition to be a gentleman and answer your questions.

(footnote continued from preceding page)

boro plant on March 18, 19, and 20 of 1975. He claims to have only subsequently learned of the potential significance of this data he "believes" he saw, but nowhere states when the significance became known to him or the source of such information (A30-31). If such information had been in appellants' files all along, mere failure to discover it or to "make the connection" would not serve as an excuse. *Lewis* v. *Kepple,* 185 F.Supp. 884 (W.D. Pa. 1960), *aff'd,* 287 F.2d 409 (3d Cir. 1961).

MR. WEINBERGER: Q Do you have any intentions by your refusal to answer to imply in any way that Mr. Leonard received any of that money?

A No.

MR. LANG: The witness has answered.

THE WITNESS: I am implying that it is none of your business.

MR. WEINBERGER: Q But it is no implication that Mr. Leonard received any money?

MR. LANG: He didn't say that." (Tr997(2)-997(3)) (Teledyne Memo, 20-21)

Appellants' attorneys were also present at Leonard's deposition—held on the same day as Walper's—when Leonard testified he had not received any of Walper's fee [illegible] 1)) (Teledyne Memo, 21). While it is clear that tney were alerted to this line of inquiry long prior to trial, appellants proffer no excuse why they did not undertake, either before or during the trial of this action, to discover what they now claim are the "true" facts. Since both Walper's and Leonard's depositions were taken under subpoena, appellants' counsel could easily have obtained rulings on Walper's refusal to answer.

Under the present facts demonstrating a total absence of due diligence, the authorities require denial of this motion. In *Giordano* v. *McCartney,* 385 F.2d 154 (3d Cir. 1967), plaintiff moved for a new trial and sought to introduce an affidavit of an out-of-state witness which was claimed to be newly discovered evidence. The Third Circuit, in affirming the lower court's denial of the motion for a new trial, held that

> "Plaintiffs have not satisfactorily explained why no attempt was made to locate and question McCartney . . . prior to trial. The ease and speed with which he was found subsequent to trial demonstrates that with the

> exercise of reasonable diligence he could have been interviewed prior to trial." 385 F.2d at 155-56.*

Thus, where the "degree of activity or diligence which led to the discovery of the evidence after the trial would have produced it had it been exercised prior thereto,"** the motion for a new trial based on such evidence must be denied. *United States* v. *Bransen,* 142 F.2d 232, 235 (9th Cir. 1944). *Accord, Eastern Air Lines* v. *U.S.,* 110 F.Supp. 499, 500 (D.Del. 1953).

Similarly, where a party before trial knows of the existence of a witness and fails to examine that witness by available discovery methods or fails to secure, before trial, an affidavit from that witness, a motion for a new trial based on a post-trial affidavit must be denied. *Plisco, supra,* 379 F.2d at 17; *Boomhower* v. *American Automobile Ins. Co.,* 251 F.2d 385 (D.C. Cir. 1958); *Stiers* v. *Martin, supra.* And a new trial will be denied when a document has been in the moving party's possession but has not been discovered in time. *Lewis* v. *Kepple, supra,* 185 F.Supp. at 888.

Under these facts and legal authorities, Judge Knapp was required to find as he did:

> "The *first* difficulty with defendants' [appellants'] position is that there is absolutely no showing that the purported new evidence could not with due diligence have been discovered prior to trial. The attempt to make such a showing is embodied in the affidavit of Robert R. MacDonnell, an attorney associated with the firm that has been substituted for

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* Here, as Leonard assisted appellants in preparing for trial and in negotiating with Teledyne's counsel prior to trial (Tr548), Leonard was obviously completely accessible to appellants and their counsel prior to and during trial.

** Both Walper's post-trial affidavits (one of which was received by them well prior to judgment) were apparently obtained *ex parte* by appellants without any form of legal compulsion.

defendants' trial counsel. With commendable candor, Mr. MacDonnell makes clear that *defendants' trial counsel could have obtained the evidence in question by the simple statagem of pressing for the answer to a question plaintiff's attorneys had posed on Mr. Walper's examination before trial.* However, while Mr. MacDonnell observes that—assuming defendants' present version of the facts—it is not surprising that plaintiff did not pursue the inquiry at pre-trial, *he offers no suggestion as to why defendants' counsel did not exploit the plainly indicated lead.* I must therefore conclude that due diligence has not been shown."* (A35-36)

POINT III

Even assuming, *arguendo*, that appellants did exercise due diligence, they did not meet the burden of showing that the "new evidence" would probably have changed the outcome of the trial.

It is settled that a motion for a new trial on the basis of newly discovered evidence will not be granted unless the new evidence, had it been produced at trial, "would probably have produced a different result." 6A Moore ¶ 59.08 [3], at 118. *Baynum* v. *Chesapeake & Ohio Ry. Co.*, 456 F.2d 658, 662 (6th Cir. 1972); *Gill* v. *U.S.*, 184 F.2d 49, 55 (2d Cir. 1950); *Helene Curtis Indus., Inc.* v. *Sales Affiliates, Inc.*, 131 F.Supp. 119, 120 (S.D.N.Y. 1955), *aff'd*, 233 F.2d 148 (2d Cir.), *cert. denied*, 352 U.S. 879 (1956).

Appellants fell far short of proving the potential impact of their "new evidence." Even assuming Walper Affidavit

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* Although this lack of due diligence was obviously central to Judge Knapp's decision denying the motion for a new trial, a point re-emphasized in his decision on reargument (A65-66), appellants' brief on this appeal does not even discuss this issue, apparently hoping that if ignored it might go away. Thus, it must be concluded that this appeal is meritless and has not been prosecuted in good faith (*see* Point VI, *infra*).

#1 were correct, it only stated that affiant had a mere "inkling" that Rouse knew Leonard was sharing Walper's fee (A21). No grounds for Walper's understanding were given. Walper did *not* state that he ever heard mention of a possible fee split made in Rouse's presence. Indeed, it is clear that this affidavit was artfully drawn to avoid having to make such a statement.*

To grant a new trial, the new evidence "must be such that it would be admissible and credible." 6A Moore ¶ 59.08[3], at 117-18. Clearly, Walper could not testify directly as to Rouse's or Coleman's knowledge. *See Texas Continental Life Ins. Co.* v. *Dunne*, 307 F.2d 242, 248 (6th Cir. 1962); *Bogart* v. *New York*, 200 N.Y. 379, 384 (1911); *People* v. *Acritelli*, 57 Misc. 574, 110 N.Y.S. 430, 450-52 (Gen. Sess. N.Y. Co. 1908) (citing authorities). There is *no* testimony by either Rouse or Coleman in the trial transcript concerning either Leonard's alleged sharing of Walper's fee or their knowledge *vel non* in this respect. Therefore, they could in no event have any trial testimony to "recant." However, Rouse and Coleman did submit affidavits (A34-41) in opposition to the new trial motion categorically denying that they ever—until they read Walper Affidavit #1—had any suspicion of or information concerning Leonard's supposed participation in Walper's fee.

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* Walper Affidavit #2, which was submitted on appellants' motion to reargue the denial of their motion for a new trial in order to "clarify the meaning of" Walper Affidavit #1 (A60), similarly eschewed a new opportunity to make such a statement, despite its absence having been expressly noted earlier in Teledyne's opposing papers (A35, 39). The reason for the absence of such a clarification is obvious. Also, Rouse and Coleman in their post-trial affidavits squarely denied that any such statement had been made, or even hinted at (A35, 39).

Additionally, since the admitted purpose of Walper Affidavit #2 was to clarify what was known to appellants in May 1975, it too cannot be considered to have been produced with due diligence.

With regard to Teledyne's supposed payments to a company called "Technicon Associates" (A30), which Waller claims to possess undisclosed "evidence" leading him to believe "is a company controlled by M. J. Leonard" (A31), and which payments he suspects might be somehow related to the Subcontract, the same comments are applicable.

Thomas M. Jubb, controller of Teledyne's Walterboro plant, reexamined the records inspected by Waller in Walterboro* and confirmed in an affidavit also submitted below (A42-45) that there was no mention of either "Technicon Associates" or "Technicon" in those records.**

Such inherently weak testimony, Judge Knapp correctly concluded, would not have changed the result of this case.***

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* These records were kept physically segregated at Walterboro (A43). Waller, as expected, could not even identify the documents which are the source of his "belief" (A30-31). Indeed, it is amazing that, out of all the records he examined, Waller would, without having made a record of it, "believe" that he recalled seeing "records of payments" by Teledyne to a company whose name "meant nothing" to him at the time but which he was later able to remember and connect upon seeing other (unidentified) documents (A30).

** While appellants' counsel stated under oath below (A18) that his client "found a $1,000 payment," a reading of the Waller Affidavit shows no mention of a $1,000 payment," nor does it say Waller "found" such a payment, merely that he "believes" he saw "records of payments" (A30). These inconsistencies, particularly unexpected considering both affidavits were presumably drafted by appellants' counsel, were not explained below or in this Court.

*** Judge Knapp, having presided at trial, was in a unique position to exercise his discretion in evaluating the potential impact of the alleged "new evidence." *Int'l Nikoh Corp.* v. *H. K. Porter Co.*, 374 F.2d 82, 84 (7th Cir. 1967).

A. Even Assuming, *Arguendo*, That Appellants Exercised Due Diligence, A New Trial Will Not Be Granted Where The New Evidence Goes Only To The Credibility Of A Witness On A Collateral Issue.

Judge Knapp stated that, even assuming all of appellants' claims in this regard were true, such evidence would merely be "cumulative, if not wholly inconsequential":

> "In the course of absolving . . . [appellants] from complicity in Leonard's fraud [on Teledyne], I clearly recognized that Leonard was in a position of conflict of interest with Eon, having been placed there by Eon's own act in offering him a bonus to unload the Army contract (see opinion, p. 20). I don't see how the picture would be much altered by positive proof that Leonard had decided to sweeten his bonus by dipping into Walper's finder's fee, or that plaintiff's agent Rouse had an 'inkling' (or actual knowledge) of this wickedness." (A54)

To try and overcome this, appellants assert that the new evidence "deal[s] with the recantation of the testimony of three witnesses" (Br., 11)—Rouse, Coleman and Leonard. Rouse and Coleman, not having testified on this alleged fee sharing, have therefore nowhere "recanted any of their testimony."* Thus, at most, appellants' "new evidence" could only create a contradiction between Leonard and Walper on the collateral issue of their having shared Walper's fee, since neither Rouse nor Coleman was asked any question at trial concerning their knowledge of any sharing of Walper's fee.**

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* *See Ballentine's Law Dictionary* 1063 (3d ed. 1969), which defines to "recant" as: "To change one's testimony as given at a former trial"; *Harrison* v. *U.S.*, 7 F.2d 259, 262 (2d Cir. 1925).

** Appellants tried to rectify this glaring flaw in their "evidence" by having their counsel meet with Leonard in New York

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The authorities are clear that evidence sought to be introduced *merely* to attack the credibility of a witness is not sufficient evidence to warrant a new trial. *See generally* 6A Moore ¶ 59.08[3], at 119-20. *Trans Mississippi Corp.* v. *U.S.*, 494 F.2d 770, 773 (5th Cir. 1974); *Helene Curtis Indus., Inc.* v. *Sales Affiliates, Inc.*, *supra*, 131 F. Supp. at 120.*

POINT IV

Answering Appellants' Point II (rescission argument): appellants have no right to rescind the subcontract.

Appellants assert that, assuming they could prove Teledyne defrauded Eon,** and while "[o]f course, recission [sic] would run to the benefit *of Eon*" (A50), they would by some unarticulated legal theory have standing to rescind

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(A47) in late October 1975—thus, of course, raising the question of why, having found Leonard so easily post-trial, appellants did not produce him at trial—but Leonard specifically left "unanswered" whether there was a split of Walper's fee and whether Rouse knew of this (A47). While this affidavit would not be admissible in evidence, being the rankest hearsay, it nevertheless further confirms that Rouse and Coleman were never told of any split, since Leonard would not so state, even in an *ex parte* unsworn statement.

* In fact, *Anderson* v. *Tway*, 143 F.2d 95 (6th Cir. 1944), cited by appellants (Br., 11), affirmed the lower court's denial of a motion for a new trial, holding that [illegible] evidence which merely attacked the credibility of witnesses would not support a motion for a new trial (143 F.2d at 105).

** Indeed, Judge Knapp found to the contrary, *i.e.*, that *Eon had defrauded Teledyne* into entering into the Subcontract, but denied Teledyne judgment against appellants only because he felt that they might not have been sufficiently aware of the misrepresentations or had the requisite *scienter* at the time (401 F.Supp. at 739).

the Subcontract under California Law (Br., 12-14). *Cal. Civil Code* § 1689 provides that

> "(b) *A party to a contract* may rescind the contract in the following cases. . . ."

It is uncontested that appellants were not "parties" to the Subcontract and thus, even assuming, *arguendo,* there was fraud on Teledyne's behalf here—which Teledyne denies—they would have no right to rescind it.* *Clancy* v. *Becker-Arbuckle-Wright Corp.,* 137 Cal.App. 43, 29 P.2d 868, 870 (1st Dist.Ct.App. 1934); *Karst* v. *Seller,* 45 Cal.App. 623, 188 P. 298, 299 (2d Dist.Ct.App. 1920).**

A. Appellants Are Estopped From Rescinding Now Because Of Laches.

Even assuming appellants are "parties" with a right to rescind, they are barred by laches from rescinding now. *Cal. Civil Code* § 1691 provides, in pertinent part, that a party seeking rescission must (1) give notice of rescission to and (2) restore any value received by the other party "promptly upon discovering the facts which entitle him to rescind."

As the facts herein show, appellants knew of the Special Account *probably* by May 1971, *certainly* in June and July

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* To the extent that appellants claim that the payment to Walper violated the "contract agreement *between Eon and the Army*" (Br., 6), they admit their defeat. Non-contracting parties, such as appellants admit they were, have no standing to raise a breach of contract defense. *Gerhard* v. *Stephens,* 68 Cal.2d 864, 442 P.2d 692, 732 (1968). Also, a defense of illegality—even if true—will not bar a conversion action where performance has occurred. *Leonard* v. *Hermreck,* 168 Cal.App.2d 142, 335 P.2d 515, 517 (4th Dist.Ct.App. 1959).

** Both Points IV and V herein obviously need not be reached unless this Court—contrary to law and fact—finds that Judge Knapp abused his discretion both in holding that appellants had failed to show due diligence *and* in finding the proposed "evidence" cumulative and inconsequential.

of 1972 after meeting with representatives of Teledyne, and *beyond question* by the commencement of this litigation.*

Under § 1691, appellants are therefore charged with knowledge of any potential fraud on Eon arising from the creation of the Special Account at the time they first became aware of its existence since, accepting appellants' position—directly refuted by Anton's own testimony (Tr2185-86) (Teledyne Memo, 16-17)—that Eon would *not* have consented to the Special Account, such later awareness would have put them on inquiry notice as to the possibility of its fraudulent creation. *Bancroft* v. *Woodward,* 183 Cal. 99, 190 P. 445, 449-50 (1920); *Harrington* v. *Paterson,* 124 Cal. 542, 57 P. 476, 477 (1899); *Greene* v. *Locke-Paddon Co.,* 36 Cal.App. 372, 172 P. 168, 169 (1st Dist.Ct.App. 1918).**

An action to rescind at the present time would therefore clearly be barred by laches. *Bancroft* v. *Woodward, supra; Marten* v. *Burns Wine Co.,* 99 Cal. 355, 33 P. 1107, 1108 (1893); *Campbell* v. *Title Guarantee & Trust Co.,* 121 Cal.App. 374, 9 P.2d 264, 265 (1st Dist.Ct.App. 1932).

B. Even Assuming They Would Possess A Right To Rescind, Appellants Must, After Having Made Suitable Tender, Make Restitution To Teledyne Prior to Rescission.

Assuming appellants were "parties" to the Subcontract, and further assuming that they could prove fraud on Eon justifying rescission, appellants as a precondition would have to restore Teledyne to its *status quo* at the time of the

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* The Complaint against appellants, which described the Special Account, is dated July 31, 1972.

** Of course, the fact that appellants made no investigation after having actual knowledge of the Special Account further leads to the conclusion that they had been aware of and had approved it from the beginning.

alleged fraud. *Cal. Civil Code* § 1691 provides, in part, that "to effect a rescission a party to the contract must"

> "(b) Restore to the other party *everything of value which he has received from him under the contract* or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so."

Thus, if appellants consider themselves "parties" to the Subcontract having the right to rescind it,* they—and not Eon—must be first required to restore to Teledyne the total invoice price to Eon for generator sets shipped by Teledyne, less the amounts actually received by Teledyne from Eon.** *Alder* v. *Drudis,* 30 Cal.2d 372, 182 P.2d 195, 202 (1947); *Kent* v. *Clark,* 20 Cal.2d 779, 128 P.2d 868, 871-72 (1942); *Joshua Tree Townsite Co.* v. *Joshua Tree Land Co.,* 100 Cal.App.2d 590, 224 P.2d 85, 90 (4th Dist. Ct. App. 1950); *Restatement of Contracts* § 349 (1932).

POINT V

Answering Appellants' Point III (equity argument): the "clean hands" maxim does not apply to the action at bar.

A. By Failing To Present The Alleged Evidence of Unclean Hands At Trial, Appellants Waived The Defense.

Appellants' alleged "new evidence" of Teledyne's "unclean hands" consists of the Waller Affidavit, the Walper

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*Clearly, appellants cannot have it both ways. If they are parties to the Subcontract with a right to rescind, they are under the corresponding duty of restitution.

** Teledyne had unpaid invoices to Eon under the Subcontract of $721,720.80 (Teledyne Memo, 28). Even with full payment of this amount, Teledyne would still show (exclusive of the costs of

(footnote continued on following page)

Affidavits and, for whatever they are worth, the hearsay statements of Leonard. Appellants did not introduce any of this "evidence" at trial, nor were they introduced in timely fashion post-judgment, although no excuse is tendered for not having done so.*

Thus, this alleged defense of "unclean hands" is unavailable to appellants.

> "Moreover, unclean hands was not pleaded by appellant nor was it made an issue at the trial. This defense must be raised in the trial court to be available. Watson v. Poore, 18 Cal.2d 302, 115 P.2d 478; Scannell v. Murphy, 82 Cal.App.2d 844, 187 P.2d 790. Appellant does contend that she did raise the issue in her closing brief in the trial court, and did argue it on the motion for a new trial. It was *within the discretion of the trial court to refuse to consider the issue at that late date.*" *Stone* v. *Lobsien,* 112 Cal.App.2d 750, 247 P.2d 357, 361 (1st Dist. Ct.App. 1952).

B. The Inherently Weak Character Of The Alleged "New Evidence" Defeats Appellants' Position.

Moreover, even assuming, *arguendo,* that the "unclean hands" issue was timely raised, it is settled that the proof

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this litigation) a large net operating loss on the Subcontract itself (Tr1847).

Appellants' counsel, who has no personal familiarity with the trial since he was substituted in on appeal, stated under oath in a post-trial affidavit—with no citation to the record—that Teledyne's "prior bid to the government" on the 1.5 kilowatt generator sets "was $330 per unit" (A16). In fact, Teledyne's prior bid was $349.75 per unit (Tr428-29, 1690-91) (Teledyne Memo, 8). And even forgetting this misstatement of fact, appellants' counsel nowhere explains the logic of his "presumption" that Teledyne would have made a profit at its earlier bid price (A16). In contrast, Judge Knapp explained with clarity the logic of the contrary position (Tr2128-31).

* Walper Affidavit #1 was executed on May 9, 1975, some three months before entry of judgment.

of "unclean hands" must, as a matter of law, be susceptible of only one interpretation:

> "But that rule applies as a matter of law *only where the evidence is susceptible of but the one inference that the transaction was entered into with the intent to defraud.* It is quite apparent that this transaction was entered into primarily at the suggestion of the seller in order to give the seller what he thought was better security." *Stone* v. *Lobsien, supra,* 247 P.2d at 361.

In the case at bar, Judge Knapp specifically found Rouse and Coleman to be "wholly credible" witnesses who agreed to the establishment of the Special Account as a security device to tie the Army Payments to payment of Teledyne's invoices (A11, 15). Additionally, while appellants' alleged "evidence" of "unclean hands" is ambiguous at best, Rouse and Coleman have stated under oath that they never—until reading Walper Affidavit #1—had any knowledge or even suspicion of a split between Walper and Leonard (A36, 40). Finally, Judge Knapp specifically found that the reference in Walper Affidavit #1 to Leonard's "share", of which supposedly Rouse and Coleman had "an inkling" (A21), referred not to Walper's "finder's fee", but rather to Leonard's $10,000 bonus to be received by him *from Eon* as a reward for negotiating a favorable subcontract (A57).

Thus, the alleged "new evidence" contained in *ex parte* affidavits apparently drawn by appellants' own counsel (A57) is susceptible of at least several interpretations under which Teledyne's "hands" would remain unsullied.

C. Appellants Were Not Parties To The Subcontract And, Therefore, Have No Standing To Assert The "Unclean Hands" Defense Either.

When distilled, appellants' claim is that Teledyne "perpetrated a fraud on Eon" (Br., 15). Assuming, contrary to fact, that such was the case, appellants have no stand-

ing to raise that claim as an "unclean hands" defense since, as has been shown true with respect to rescission,

> "[t]he party . . . complaining that his opponent is in court with 'unclean hands' . . . must show that *he himself has been injured by such conduct,* to justify the application of the principle to the case. The wrong must have been done to the defendant himself and not to some third party." 2 Pomeroy, *Equity Jurisprudence* § 399, at 99 (5th ed. 1941).

Pomeroy has been cited in California as controlling on this issue. *Bradley* v. *Bradley,* 165 Cal. 237, 131 P. 750, 752 (1913); *Germo Mfg. Co.* v. *McClelian,* 107 Cal.App. 532, 290 P. 534, 538 (3d Dist. Ct. App. 1930).

D. Even Assuming Teledyne's Conduct Was Somehow Wrongful, And Further Assuming Appellants Have Standing To Raise This Claim, A Court Will Not Allow A Party To Assert The Illegal Nature Of The Contract After Performance Has Been Completed.

Teledyne performed its obligations to deliver the 1.5 kilowatt generator sets, the shipment of which produced the Army Payments, which in turn were to have been paid to Teledyne *via* the Special Account. It is undisputed that Antno, and later the remaining appellants, formally ratified and approved *at least* the basic terms of the Subcontract—including the price of $360 per generator set (Tr586, 781, 1206). Eon did not pay Teledyne the bargained-for Subcontract price reflected in its invoices, the appellants instead directing that the Army Payments be converted to Eon's benefit.

Even assuming, contrary to fact and law, that some illegality attended the Special Account's inception, Teledyne nevertheless has a perfect right to pursue appellants for their independent torts.

> "[C]onceding that the business arrangement, whether it constituted a partnership or not, was con-

> trary to public policy, and void, still we think the plaintiff was entitled to recover. If the original contract between the plaintiff and Davidson were void, as claimed, nevertheless, that agreement having been performed, and the money derived therefrom having been collected and invested in real property by Davidson for the joint benefit of both parties, this action to enforce a trust as to the plaintiff's one-half interest in such property against the successors of Davidson cannot be affected by any illegality in the original agreement, through the performance of which the purchase price of the property was acquired. It cannot be doubted that courts will refuse to enforce contracts which have for their object some act which is contrary to law or sound public policy. But where, as here, the action is not to enforce such contract, but is to establish title to property acquired under such a contract, the action may be maintained. *The difference between the enforcement of an illegal contract and a suit to recover property acquired with funds derived through such a contract has always been recognized by the courts.*" *Johnson* v. *Davidson*, 54 Cal. App. 251, 202 P. 159, 160 (1st Dist. Ct. App. 1921).

See also McDonald v. *Lund*, 13 Wash. 512, 43 P. 348 (1896) (cited in *Johnson* v. *Davidson, supra*).

POINT VI

Teledyne is entitled to additional interest, double costs and its attorney's fees for having to oppose this frivolous appeal.

Appellants' brief nowhere discusses the threshold issue here involved, *i.e.*, whether Judge Knapp *abused his discretion* in finding that appellants had *failed to exercise due diligence* in discovering the "newly discovered evidence." It is overwhelmingly apparent that due diligence was not and could not have been shown below, and that Judge

Knapp's decisions based on appellants' lack of due diligence were unquestionably correct.

Rather than meeting this issue head on, appellants choose to avoid mentioning it altogether. In similar fashion, appellants' brief ignores all authorities cited in the Teledyne Memo submitted below, even though those authorities directly addressed the *precise* arguments appellants seek to advance on this appeal.

Moreover, as shown by Teledyne herein, what at this stage can only be deemed appellants' intentional misstatements and omissions of relevant facts and law further demonstrate this appeal's complete lack of merit.

Under these circumstances, double costs and attorney's fees, as well as additional interest on its judgment, should be awarded to Teledyne. 28 U.S.C. § 1912; *Fed. R. App. P.* 38. *See Oscar Gruss & Son* v. *Lumbermens Mutual Cas. Co.*, 422 F.2d 1278, 1283-84 (2d Cir. 1970), where, in language most relevant here, this Court held:

> "We have considered [appellant's] other arguments to us and none has the slightest merit. Indeed, after a full review of the record, we believe that most are far-fetched indeed. . . . In any event, we do not intend to dignify these and other makeweight arguments by separately discussing each one. Moreover, the net impression we get from the record is one of calculated delay and a thrashing about by [appellant] for theories—even of dubious or no value—to evade its obligations. . . . In any event, on the basis of the conduct of the appeal alone, we regard this as an appropriate case for invoking both 28 U.S.C. § 1912 . . . and F.R.A.P. 38. . . . In view of the superfluity of issues on appeal, the frivolity of almost all of them, *and the briefing of many in a manner that simply ignored the abundant evidence supporting the determination of the jury and the judge,* we exercise our discretion under the statute and rule as follows: [appellee] is awarded

> an additional four percent interest on the judgment appealed from, double costs on [appellant's] appeal, and $7,500 in attorney's fees."

Similarly, in *Furbee* v. *Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972), it was held:

> "In these circumstances . . . dismissal of the case by the District Court was certainly not abuse of discretion.
>
> * * *
>
> "Moreover, we deem [the] appeal from the order of dismissal to be, in the circumstances, utterly without merit and frivolous. The federal case law supporting [appellee] is unambiguous and unwaivering [sic]. Appellant was made *fully aware of the cases Appellee chiefly relied on* in a memorandum in support of defendant's motion to dismiss, filed with the District Court and reprinted in Appellant's brief. *We find nothing in Appellant's argument on appeal which casts the remotest doubt on those cases. Notwithstanding the clear state of the law,* [*appellant*] *pressed his appeal,* involving [appellee] in the inconvenience and expense of employing counsel to resist the appeal. Appellate courts are burdened by a heavy volume of business and the problem is needlessly aggravated when frivolous appeals are taken. *Justice, we think, requires* that the costs of this appeal, including the expense of printing Appellee's brief, and reimbursement for reasonable attorney's fees be awarded to [appellee]. F.R.App.Pro. Rule 38. *See* 28 U.S.C. § 1912."

Justice so requires here.

Teledyne also requests this Court, under the authorities cited above, to include in such award double costs and attorney's fees incurred by it on the companion appeal, which similarly appears to have been undertaken by appellants for harassment value alone.

CONCLUSION

The order of the District Court should be affirmed, with additional interest, double costs and attorney's fees awarded to plaintiff-appellee.

Respectfuly submitted,

BREED, ABBOTT & MORGAN
Attorneys for Plaintiff-Appellee
One Chase Manhattan Plaza
New York, New York 10005

STEPHEN R. LANG
C. MACNEIL MITCHELL
GEORGE F. VARY
Of Counsel

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

TELEDYNE INDUSTRIES, INC.,
Plaintiff-Appellee,
against

ODIF PODELL, SIMON SRYBNIK, NICHOLAS ANTON,
SAUL WALLER,
Defendants-Appellants,
and

EON CORPORATION and KERNS MANUFACTURING CORP.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons , being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 25 Elliott Place, Bronx, New York 10452
That on November 8, 1976 , he served 2 copies of
BRIEF OF PLAINTIFF-APPELLEE
on
TRUBIN, SILLCOCKS, EDELMAN & KNAPP, Esqs.
375 Park Avenue
New York, New York

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Jerry N. Simmons

Sworn to before me this
8th day of November , 1976

John V. Despositio

JOHN V. DESPOSITO
Notary Public, State of New York
No. 30-0932350
Qualified in Nassau County
Commission Expires March 30, 1977